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JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM 1960

No. 283

FIRST NATIONAL BANK OF CHIPPEWA FALLS, A CORPORATION
Plaintiff and Petitioner

VS.

CHARLES HENNEMAN COMPANY, A CORPORATION
Defendant

ANDY JOHNSON AND VIOLET JOHNSON
Defendants and Petitioners

UNITED STATES OF AMERICA
Defendant and Respondent

FRANK HAUPTMANN, AS RECEIVER OF CHARLES HENNEMAN COMPANY
Defendant

CHIPPEWA COUNTY
Defendant and Respondent

JOINT PETITION FOR WRIT OF CERTIORARI OF FIRST NATIONAL BANK OF CHIPPEWA FALLS, AND ANDY JOHNSON AND VIOLET JOHNSON

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JOINT PETITION FOR WRIT OF CERTIORARI OF FIRST NATIONAL BANK OF CHIPPEWA FALLS, AND ANDY JOHNSON AND VIOLET JOHNSON

PRINTED OPINIONS OF COURTS BELOW

Official Reporter: 10 Wis. 2d 260, Advance Sheets, No. 3.
Unofficial Reporter: 103 N. W. 2d 24.

STATEMENT OF JURISDICTIONAL GROUNDS

(1) The decision of the Wisconsin Supreme Court here sought to be reviewed was dated and entered May 3, 1960.

(2) No rehearing was requested nor was time for petitioning for Certiorari extended.

(3) Jurisdiction of the cause is conferred on the Supreme Court of the United States by Section 1257(3), *Title 28, U. S. Code*, which provides as follows:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court, as follows: * * *
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes, or commission held or authority exercised under, the United States."

QUESTIONS FOR REVIEW

I. In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:

(a) The statutes creating and defining the federal lien, or,

(b) The due process clause of the Fourteenth amendment to the Federal Constitution, or,

(c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?

II. If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or state law give them that right as against all later liens?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(Full text set out in Appendix II., Page 18a.)

I. Constitutional Provisions.

Article XIV, Sec. 1, United States Constitution.

II. United States Statutes involved:

28 U. S. C. 1257(3)
26 U. S. C. 3670
26 U. S. C. 3672
26 U. S. C. 3704(c)(2)

III. *Wisconsin Statutes* involved:

1951, Sec. 70.01
1951, Sec. 70.02
1951, Sec. 70.03
1951, Sec. 70.10
1951, Sec. 70.17
1951, Sec. 70.32(1)
1951, Sec. 278.10(4)

STATEMENT OF THE CASE

I. Statement of facts. (Pursuant to Rule 23(e)).

This joint petition for Certiorari is brought to review a decision of the Supreme Court of the State of Wisconsin entered on May 3, 1960. The decision of the Wisconsin Supreme Court is reported in Vol. 10, Wisconsin Reports, Second Series, page 60, Advance Sheets, No. 3. It is reported in the Unofficial Reporter in Vol. 103 N. W. 2d 24.

The suit is a mortgage foreclosure action and the questions involve the relative priorities of a first mortgage, a second mortgage, a federal tax lien, and a local real estate tax lien.

The case was tried on stipulated facts and was submitted to the trial court on March 22, 1955 (Record page 102).

The pertinent facts are as follows:

A tax audit of the Charles Henneman Company of Chippewa Falls, Wisconsin was performed covering the years 1942 to 1946 and 1948.

As a result of that audit, unpaid federal income and excess profits taxes in the amount of $95,025.43 were assessed against the company on March 15, 1951 (Record pages 90, 91). On March 21, 1951, the assessment lists were received by the District Collector of Internal Revenue at Milwaukee, Wisconsin (Record page 91). (This is the date that the federal lien became effective as against Chippewa County.) On April 20, 1951, a notice of the federal lien was filed in the office of the Register of Deeds for Chippewa County, Wisconsin and the lien thereupon became perfected as against all subsequent purchasers (Record page 92).

At the time the federal lien was filed, the company owned three parcels of real estate.

The first of these three parcels was a garage building. This was subject to a first mortgage in favor of the First National Bank of Chippewa Falls, Wisconsin in the face amount of $35,000.00. The mortgage was dated January 6, 1948 and properly recorded and provided for payments of $486.85 per month (Record pages 131, 132). The garage building was also subject to a second mortgage in favor of Andy Johnson and Violet Johnson for a face amount of $20,000.00 (Record pages 134, 135).

The second and third parcels of real estate owned by the company were, respectively, a vacant lot and a residence. The Johnsons' $20,000.00 mortgage was a first mortgage as to each of these parcels (Record page 146, Ex. 4).

In addition, the Johnsons owned a mortgage for $1,000.00 against the vacant lot. This was a second mortgage (Record page 149, Ex. 7).

After the federal lien was filed, the company defaulted in the payment of real estate taxes assessed against the above property by the City of Chippewa Falls (Record page 97). The unpaid taxes were for the years 1951 to 1954 inclusive and amounted to a total principal sum of $15,871.35 (Record page 157). (They have borne interest at the rate of .8% per month during the pendency of this action and interest now amounts to a sum in excess of $9,000.00 (Record page 157).) An itemization of taxes and interest due as of January 20, 1959 is shown at Appendix III, p. 22a).

The company defaulted on the payment of the bank mortgage on December 9, 1953 (Record page 132) and on the payment of the Johnsons' first mortgage on April 1, 1953 (Record page 134).

During the years 1951, 1952 and 1953, the company tried to compromise its tax liability with the government

but was unsuccessful (Record page 111). On January 11, 1954, it made a voluntary assignment for the benefit of its creditors, under a Wisconsin Insolvency Statute (Record pages 111, 112). The three parcels of real estate were sold in that insolvency proceeding for a total sum of $60,500.00 and the proceeds from their sale were paid to the Clerk of Court for Chippewa County, Wisconsin, where they are now held pending the decision of this cause (Record pages 112, 113). The sale price was allocated among the parcels as follows:

Garage Building	$49,000.00
Vacant Lot	4,500.00
Residence	7,000.00
Total	$60,500.00

(Record page 112).

The Johnsons' mortgages all contained provisions permitting them to pay any real estate taxes not paid by the company, and add them to their lien at the expense of later lienors (Record pages 146, 147, 149, Exhibits 4, 5, 7). The bank's mortgage did not contain such a provision but under the law of Wisconsin, such a provision is implied in the mortgage.

59 C. J. S., Mortgages, Sec. 325, p. 442;
Cobban v. Northern Wisconsin State Fair Association (1933), 212 Wis. 235, 248 N. W. 871;
Johnson v. Ryan (1926), 188 Wis. 620, 206 N. W. 871;
Hackett v. Vandusen (1907), 132 Wis. 204, 111 N. W. 1097;
Heller v. Neeves (1896), 93 Wis. 637, 67 N. W. 923.

On May 14, 1954, the bank began the present action to foreclose its mortgage (Record pages 2, 3).

The City of Chippewa Falls had sold its claims for taxes to Chippewa County, pursuant to provisions made in the *Wisconsin Statutes* (Record page 94). The county was joined as a defendant in the foreclosure action in November of 1954 by the service of a second amended complaint (Record page 52).

In the foreclosure action, each party claimed absolute priority (Record pages 60, 61, 70, 75) except for the Johnsons who admitted that they were junior to the bank as to the garage property but claimed priority as against all other parties (Record pages 66, 67, 32, 33).

On June 20, 1959, the trial court decided the action and found the order of priority to be:

1. The mortgagees.
2. The United States.

The trial court, in its opinion, stated that the federal lien had taken all of the real estate of the company except for the mortgagees' interests. It found that there was nothing left to tax except the mortgages, and pointed out that, although Wisconsin had once taxed mortgagees separately from the mortgagor's interest, it no longer did. It, therefore, was of the opinion, that the county's taxes were unlawful and uncollectable (Record pages 114, 115, 118, 120; Appendix I, pages 1a-3a).

About September 1, 1959, the county appealed to the Wisconsin Supreme Court. (The notice of appeal was served on different parties at different times and we do not have the exact date it was last served so that we cannot state the exact date of the appeal.) The cause was argued April 4, 1960 and decided on May 3, 1960.

The Supreme Court of Wisconsin held that priority as between the mortgagees and the United States was governed by federal law. It, therefore, ordered that the trial court

deduct from the funds available for distribution a sum equal to the amount of the mortgages and pay the balance to the United States in satisfaction of its lien. However, it then found that priority between the county and the mortgagees was governed by Wisconsin law and it, therefore, ordered that the county's claim for taxes be satisfied out of the fund set aside for the mortgagees because under Wisconsin law, real estate taxes have absolute priority over all other claims. The Wisconsin court did not discuss the claim that the county's taxes were illegal. Nor did it mention or decide any of the other federal questions raised by the mortgagees in their briefs.

The record was remanded from the Wisconsin Supreme Court to the Circuit Court for Chippewa County on June 30, 1960 (Record page 248).

The motion for judgment was heard on July 19, 1960. The judgment, as entered finds that the bank's mortgage, on that date, amounted to $8,459.15, and the Johnsons' mortgages amounted to $27,782.16. The $66,881.52 available for distribution was awarded as follows:

Bank	None
County	$26,033.21
United States	30,640.21
Johnsons	10,208.10

The judgment allows the county to satisfy its tax lien out of the proceeds set aside for the mortgages (Record pages 536-540, Appendix IV, pages 28a-35a).

II. Federal questions raised (Rule 23 (1) (f)).

Because of the manner in which the opinions of the lower courts were written, we have returned the briefs of counsel with the record. The briefs in the trial court are not a part of the record proper, but the briefs in the Supreme

Court of Wisconsin are. We have paged all of the briefs as part of the record.

The first federal question is as follows:

> "I. In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:
>
> (a) The statutes creating and defining the federal lien, or,
>
> (b) The due process clause of the Fourteenth Amendment to the Federal Constitution, or,
>
> (c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?"

This question was first set out expressly in a brief filed in the trial court by the co-petitioners, Johnsons. They said:

> "Consequently, the defendants Johnson submit that they have the contractual right to pay the delinquent real estate taxes and add such amounts so paid to the amount of their mortgage indebtedness, which is entitled to priority against the Government, under Section 2672, or, in the alternative, that, if such mortgagees cannot obtain for such payment of delinquent real estate taxes the same priority as the mortgage indebtedness is entitled to under Section 3672, then the municipality cannot constitutionally overleap the intervening government lien and take from the mortgagee that portion of the mortgagee's security which equals the amount of the delinquent real estate taxes.
>
> "These mortgagees offer another suggestion for the consideration of the Court. We are dealing with

equitable principles, and the mortgagees contend that if they have to pay real estate taxes out of their mortgage funds, such taxes should be based upon the mortgagees' share of the real estate, and not on the entire assessed valuation of the real estate. This lawsuit demonstrates very clearly that, after deducting the mortgagees' share of the real estate, the balance of the real estate actually belongs to the United States. The United States does not have title to the real estate, because it has not foreclosed its lien; and, therefore, technically the local municipality might still have some legal basis for assessing real estate taxes: But, it does not have any equitable basis for requiring the mortgagees to pay taxes on the entire assessed valuation. The application of this principle is important with reference to the principal piece of property. As to the other two pieces of property, there would be no argument. However, on the principal piece of property, the balance owing the plaintiff and the defendants Johnson would approximate $16,000.00; whereas the property has an assessed valuation of some $90,000.00. Where everything beyond the $16,000.00 belongs to the United States Government, why should not a court of equity limit the municipality's recovery of delinquent real estate taxes to that based upon the amounts owing on the first and second mortgages?" (Record pages 224-21, 224-22, Appendix III, pages 23a, 24a).

This was the basis for the trial court's decision. In its memorandum of decision it said:

"It is not apparent how in the circumstances present the rights of lien claimants which are completely overriden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage there is nothing after the mortgage to which

such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that" (Record page 115, Appendix I, page 2a).

The Johnsons claimed an absolute priority subject only to the bank's first mortgage. In their answer and cross complaint, they demanded judgment as follows:

> "* * * that after payment of the amounts due plaintiff, these defendants be paid out of the proceeds the amounts adjudged and determined to be owing them * * *" (Record page 32, Appendix III, page 22a).

The Bank's second amended complaint also claimed absolute priority for its first mortgage. Its prayer for relief contained the following:

> "* * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorneys' fees and such additional amounts as the plaintiff may advance for payment of taxes * * *" (Record pages 60, Appendix III, page 22a).

In the Supreme Court of Wisconsin, the question was fully briefed by both the Bank and the Johnsons.

The Bank's brief discussed the problem at record pages 429 to 440. The Bank claimed: (1) That under Wisconsin law the County could not levy a tax against the property because in Wisconsin real estate is taxed to the owner, and the record owner, the Charles Henneman Co., had no interest in the property after the federal lien attached; (2) That if any tax could be lawfully collected it could only be a tax based on the value of the mortgagees' interest, since the federal interest was exempt from taxation.

The Johnsons also discussed this problem in their brief (Record pages 404-415).

The Wisconsin Supreme Court did not discuss this problem in its opinion, but it did decide that the County could collect the whole of its tax from the funds allocated to pay the mortgagees (Record pages 233-246, Appendix I, pages 3a-17a).

The second federal question is as follows:

> "II. If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or state law give them that right as against all later liens?"

The Bank's prayer for relief in its second amended complaint read as follows:

> "Wherefore, the plaintiff demands judgment * * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorney's fees and such additional amounts as the plaintiff may advance for the payment of taxes * * *" (Record page 60, Appendix III, page 48).

> "* * * that the Court determine and adjudge the priority of the liens of the defendants, United States of America and Chippewa County * * *" (Record page 61).

The Johnsons' answer and cross complaint contained the following allegation:

> "* * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defen-

ants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees * * *" (Record page 32, Appendix III, page 22a).

And their prayer for relief contained the following:

"* * * that this Court adjudge and determine the right of the plaintiff and these defendants under the terms of their respective mortgages to pay the real estate taxes on the mortgaged premises accruing subsequently to the effective date of the lien of the United States of America; * * *" (Record page 33, Appendix III, page 22a).

The County filed a brief in the trial court urging that the mortgagees be afforded this right. At record page 224, f. 4, it stated that it concurred with the Johnsons' position in this respect.

In their trial court brief, the Johnsons stated that they were willing to pay the taxes if they could claim the protection of their mortgage (Record page 224-11, Appendix III, page 23a). The Bank also, in its brief in the trial court, urged that it be afforded this right (Record pages 224-61, 224-64, Appendix III, page 24a-25a).

When Chippewa County appealed, this problem was squarely presented by all parties.

The County first raised it by complaining that the trial court had disregarded a statutory requirement for notice before judgment, thus depriving it of the right to buy the Bank's mortgage and add its taxes to that and claim for the whole (Record 316, 317, 318; App. III, p. 25a).

The Johnsons asked for the right to pay the taxes in their brief (Record 405, 406; App. III, p. 25a-26a). The

Banks' brief also covered the problem (Record 441-443; App. III, p. 26a-27a). The United States devoted one section of its brief to a discussion of it (Record 471-476). The brief of Amicus Curiae also urged this resolution (Record 485-488).

The Supreme Court of Wisconsin does not discuss the question in its opinion.

ARGUMENT

I.

Introduction.

A. Statutory basis for jurisdiction.

The federal questions presented for review are divided into two classes: (1) Those dealing with the ability of Chippewa County to collect its claimed real estate tax, and (2) Those which assume the county's tax is valid, but claim the mortgagees have the federal right to pay that tax and add it to their lien as against the United States lien.

This Court has jurisdiction of the first class of federal questions under the following language in *28 U. S. C. 1257*:

> "(3) By Writ of Certiorari, * * * where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution * * * or laws of the United States * * *."

Jurisdiction of the second question is conferred by the following language in the same statute:

> "(3) By Writ of Certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or Statutes * * * of the United States."

This view of the effect of the federal lien was the basis for the trial court's determination of priority. In its memorandum of decision, the trial court said:

> "It is not apparent how in the circumstances present the rights of lien claimants which are completely overridden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage, there is nothing after the mortgage to which such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that."

This was fully presented to the Supreme Court of Wisconsin in the brief filed by the Bank. So that there can be no question about its having been fully presented, we have caused all of the briefs filed in that Court to be certified as a part of the record in this cause. We would like to ask the Court to refer to the Bank's brief (Record pp. 429-440) at this point. The Johnsons also discussed the point in their brief at Record pp. 404-415.

B. Distinction between this case and U. S. v. New Britain (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

The questions presented here are an outgrowth of this Court's decision in *United States v. City of New Britain* (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520.

In that case, this Court dealt with the conflicting claims of local tax liens and a federal income tax lien. The dispute on appeal to this Court was between the local tax lien and the federal tax lien. The local tax lien claimed priority since it could be paid by the mortgagee who was admittedly prior to the U. S. lien. The federal lien claimed

priority as against the local lien on the basis of federal supremacy. This Court decided that as between the federal liens and the local liens, the prior in time was the prior in right. Then it stated in a dictum, that the United States was not interested in whether or not the city of New Britain received its taxes before the mortgagee since that was a matter of state law. The county seeks a literal interpretation of that decision in this case and ignores the question raised as to the validity of its tax which was levied after the federal tax lien attached. In other words, the difference between the two cases is: This case deals with the question of the validity of the taxes sought to be levied by the local government, whereas, the New Britain case dealt with a valid local tax and the question was its priority as against the federal lien.

C. The Wisconsin court did not discuss any of the federal questions in its opinion.

This, of course, raises the question of whether or not we have any standing to review that decision. We will devote the first section of our argument to that point, so that we will not weary the Court with repetition. Then we will discuss the federal questions separately, showing the basis for this Court's jurisdiction, and the reasons why it should grant certiorari, as to each.

II.

Since the Wisconsin Supreme Court actually decided the questions raised here, although it did not discuss them in its opinion, this court may properly review that decision.

We concede that even the most careful reading of the opinion of the Wisconsin Supreme Court would not indi-

cate that any of the questions here raised had been presented to it. The opinion simply makes no mention of them. We insist that these questions were properly before that court, and that it actually decided them against us, even though it did not say that it did.

For the purpose of discussing this point, we can state that the federal questions fall into two categories: (1) Those which question the county's ability or right to collect its tax, and (2), one that assumes that the county's tax is lawful and collectable, but claims that the mortgagees have the right to pay the county tax and add it to their mortgage liens at the expense of the federal lien.

The Wisconsin court did not discuss any of these questions, but it held that the county could collect its tax from the mortgagees, and it did not give the mortgagees the right to pay the taxes at federal expense. The *effect* of the decision is, therefore, to decide both questions, and to decide them adversely to us.

It is clear that this failure on the part of the Wisconsin Supreme Court does not defeat federal jurisdiction. To so hold would, of course, allow lower courts to prevent this Court from reviewing any embarrassing question, by the simple expedient of not discussing it.

The only effect of the lower court's action (or rather, failure to act) seems to be to raise the question of whether or not there was an adequate non-federal basis for its action.

In *Ellis v. Dixon* (1955), 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231, this Court considered a case much like this one. In that case, the New York Court of Appeals denied a motion for leave to appeal, but without opinion. This Court said:

> "In these circumstances, we must ascertain whether that court's decision 'might' have rested on a non-federal ground * * *."

There cannot possibly be any non-federal ground here, for two reasons:

First, there has never been any claim below that our procedure was in any way faulty. Instead, the federal questions have been argued on the merits at each stage by all parties.

Second, except for a procedural defect, it is not possible to have a non-federal ground here. Either the county's tax is unlawful or it is not. If the tax is lawful, then the mortgagees either have the *federal right* to pay it, or they do not. The case is that simple.

To summarize, the lower court's failure to discuss these questions in its opinion does not preclude this Court from reviewing the case, *because the lower court actually decided the issues.*

III.

The federal question which deals with the county's ability to levy and collect its tax has not been decided by this court.

A. Statement of the problem.

The first question is as follows:

> "In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where that property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and collect a real estate tax on the full market value of the property, or is it barred from taxing that part of the property taken by the federal lien, by:
>
> (a) The statutes creating and defining the federal lien.

(b) The due process clause of the Fourteenth Amendment to the Federal Constitution.

(c) The equal protection clause of the Fourteenth Amendment to the Federal Constitution?"

A summary of the reasoning behind this facet of the case is essential to an understanding of its importance. An extended discussion can be found in the briefs in the Wisconsin Supreme Court (Bank's Brief, Record pp. 429-440, Johnson's Brief, Record pp. 395-415).

The statutes which create and define the federal lien, and the cases construing them, show that the federal lien takes the property of the taxpayer when it attaches. The effect of this on the United States is obvious—once its lien has attached, the state government cannot tax the property and collect the tax from the United States. (This has been the unanimous holding of the federal courts that have considered the problem.)

Since the federally owned share is not taxable by the state, the state cannot continue to levy a tax on the whole of the market value of the property, and collect it from the mortgagees' interest.

The due process clause, and the equal protection clause both limit the state's power to tax, to a tax on the value of the mortgagees' interest.

Under Wisconsin law, real estate is assessed to the owner, not split up into mortgagor and mortgagee interests. Since the United States had become the owner of the property, no tax could be levied or collected.

Any other decision would disregard the clear intent of Congress in enacting Sec. 3672, *Title 26, U. S. C.* which protects mortgagees from the federal lien.

B. Jurisdictional basis for review of the question.

The foregoing summary clearly shows that this is a federal question.

> "A federal question is raised * * * where the case involves a question of the construction and application of a congressional enactment * * *"
>
> *54 Am. Jur., United States Courts*, Sec. 246.

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question."
>
> *United States v. Security Trust and Savings Bank* (1950), 340 U. S. 47, 71 S. Ct. 111, 95 L. Ed. 56.

Jurisdiction is conferred on this Court to review this case by *28 U. S. C.* 1257(3) which permits the use of a writ of certiorari where the state statute is claimed to be repugnant to a federal statute, and also under that portion of the statute which permits review where a right under a federal statute is claimed.

C. Basis for issuance of a writ of certiorari.

We have been wholly unable to find any decision of this Court dealing with this problem. As a matter of fact, there seems to be only one decision of any court that even mentions its existence. That is the opinion of the District Court in *United States v. City of New York* (D. C. E. D. of N. Y., 132 F. Supp. 779). In that case, the United States was suing to quiet title to real estate it had sold at a distraint sale to foreclose an income tax lien. The city claimed for taxes levied after the federal lien attached to the property, and before the sale. The United States had purchased the property at the sale. That court had no difficulty in

finding that the city could not collect its taxes as against the United States, and in the course of its decision it said:

> "If the question were to arise in reference to a deed made to a private purchaser at such a public sale it might be even more difficult of resolution."
>
> *United States v. City of New York* (D. C. E. D. of N. Y.), 132 F. Supp. 779.

Since the issue has never been decided by this Court, the provisions of Rule 19(1)(a) govern.

There is an important practical reason why this question should be reviewed by this Court. It is that as the matter now stands, when the government forecloses its lien, and there is a mortgage also attached to the property, a buyer at a distraint sale will bid less for the property than he actually could. This is because under the state of law left by the *Henneman* case decision in the Wisconsin Supreme Court, the private buyer will have to pay the real estate tax accruing after the lien attached and before the sale. If, however, that tax is invalid, then on distraint sale the government will receive the full value of the property, not the value of the property less accrued real estate taxes. We think that this should interest the federal government considerably in the decision of this case.

D. Reasons for granting certiorari.

Rule 19 also indicates that there must be special and important reasons for review. We believe this case fully qualifies.

First, the problem appears to arise with considerable frequency. It has only been since the decision in *United States v. New Britain* (1954), 347 U. S. 81, 74 S. Ct. 367, 98 L. Ed. 520, that this problem could arise; and yet there have been a very large number of reported cases

which have dealt with the priority circle. Of those, it is not possible to know how many might have been differently decided if the question of the local tax lien's validity had been raised.

Second, the priority circle has been extensively discussed by the bar. The American Bar Association has been particularly concerned. See:

Final Report of the Committee on Federal Liens ABA, 1959, pp. 18, 28-31;

Effect on Banks and Secured Lenders of Federal Tax Liens Proposals, Vol. 14, The Business Lawyer 782;

Federal Tax Liens—A Panel Discussion Summarized, Vol. 15, The Business Lawyer, p. 175 at p. 190.

At this time, a complete redrafting of the federal lien statutes has been proposed, but no action has been taken on it (HR 7914, HR 7915, S. 2305, 86th Congress).

E. Conclusion.

In conclusion then, we feel that the Court should grant Certiorari and review this problem because of the frequency with which it arises and because of its importance to federal revenues and its effect on distraint sales. The problem is new and has never been passed on by this Court, nor any other lower court so far as we can determine, except, of course, by the Supreme Court of Wisconsin in this cause.

IV.

This court should review the question inquiring as to the mortgagees' right to pay the local taxes and add them to their lien at the expense of the federal lien because this problem has arisen frequently in lower courts but has never been settled by this court.

A. Statement of the problem.

The second federal question presented to the Court is:

> "If the county's tax can be lawfully levied and collected, then may the mortgagees pay it and add it to the sums due under their mortgages at the expense of the federal lien where their mortgages or the state law give them that right as against all later liens?"

The Johnsons' mortgages contain a standard clause allowing them to pay real estate taxes and add such payment to the amount of their mortgage. Under Wisconsin law, this payment would then have priority over all junior lienholders. The question is whether or not that payment would have priority, as against the federal lien.

B. Reasons why certiorari should be granted.

There is really only one reason for granting certiorari on this question, but it is a most compelling one. It is the extensive conflict among the authorities that have dealt with the problem.

There is a conflict in the decisions of the courts of appeal that have dealt with the problem. The following cases have allowed the mortgagees priority for such advances without any extended discussion:

U. S. v. Seaboard Citizens National Bank (1953), CA-4th, 206 F. 2d 62;

U. S. v. American National Bank of Jacksonville (1958), CA-5th, 255 F. 2d 504.

The following cases have denied the mortgagees priority for such advances:

U. S. v. Christenson (1959), CA-9th, 269 F. 2d 264;
U. S. v. Lord (1957), DC-D. N. H., 155 F. Supp. 105.

The only state court case which has discussed the problem at length allowed tax advanced as a cost of preservation of the property. This case contains an extended discussion of the problem.

Rikoon v. Two Boro Dress, Inc. (1957), 171 N. Y. S. 2d 19.

The problem has arisen with such frequency that it has been discussed in various legal literature.

Anderson, *Federal Tax Liens—Their Nature and Priority*, Vol. 41, Cal. Law Rev. No. 2, p. 241, at p. 269, 270.

The American Bar Association committee on federal liens discussed this problem in its report and considered it an open question.

Final Report of the Committee on Federal Liens, American Bar Association, Feb. 23, 1959, pp. 29-30.

It is obvious that this question is going to arise in every mortgage foreclosure that involves a federal income tax lien. Sooner or later this Court is going to have to pass on it. Under the present state of the law, mortgagees do not know whether or not they dare to advance sums for local real estate taxes once a federal lien has been filed. For example, after the decision in this case by the Supreme Court of Wisconsin, the Rowley Service Bureau of Madi-

son, Wisconsin, in its Bankers Service letter, advised its clients that in this situation, they should pay local real estate taxes and that if they did these would be prior to the federal lien.

> *Rowley Service Bureau, Bankers Service Letter,* June 17, 1960.

The conflict in the authorities, and the frequency with which the problem will arise make this a proper question for certiorari.

C. Special problems presented by the record.

We believe that the respondents will oppose the issuance of a writ of certiorari, because neither of the mortgagees have actually paid the county's taxes.

This point totally ignores the very nature of this case. In their complaint the Johnsons alleged as follows:

> "* * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defendants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees." (Record p. 32; Appendix III, p. 22a).

The prayer for relief demanded judgment determining their right to pay the county's tax and claim priority against the federal lien. The trial court, in its opinion, said:

> "Among the contentions advanced in briefs of counsel is that the mortgagees should even now be permitted to pay the real estate taxes and add the amount thereof to the mortgage debt. As herein indicated that is not necessary to maintain the preferred position of

the mortgages, and it is most doubtful whether such procedure could be sustained as against the federal lien" (Record p. 115; Appendix I, p. 2a).

It is perfectly proper to ask for such relief in a mortgage foreclosure action in Wisconsin. In other words, a party can have declaratory relief in such an action. This is provided for by Sec. 278.10(4) of the *Wisconsin Statutes*, which allows such advances to be added to the judgment by order after it is entered.

It is obvious that in a Wisconsin foreclosure action the mortgagee need not pay the taxes without having the Court's opinion as to their priority. Therefore, this question is properly before this Court in this case.

There is one further point that the Court should consider in this connection. That is that the Bank's mortgage amounted to only about $8,000.00, and the Johnsons' to about $25,000.00, while the County's taxes amounted to a sum in excess of $15,000.00. We believe that it is unrealistic and unreasonable to expect the mortgagees to risk the further sum of $15,000.00 in order to even have standing to raise this question.

In summary then, we believe the question as to the right of the mortgagees to pay the county's tax is a serious one which should be resolved by this Court at the first opportunity. There is a conflict in the decisions of the lower courts which should be resolved by this Court.

V.

CONCLUSION

A. Nature of relief sought.

We are first asking that the Court adjudicate the effect of the federal lien. If, where it exceeds the taxpayer's inter-

est in his property, it takes that property and prevents taxation by the states then a further examination of the problem is not necessary.

If, however, the county's tax is valid then a further question is presented. That is whether or not the mortgagees may pay that tax and add it to their mortgage liens as against the federal lien.

B. Summary of reasons for granting.

The question as to the validity of the county's tax is an important one, and has never been decided by this Court. We think the law as it now is adversely affects the United States because it tends to lower the bids made at distraint sales.

If the Court finds that the county's tax is valid and collectable the question of enlargement of the mortgage liens at the expense of the federal lien is presented. There is considerable conflict in the authorities on this question, and because of its effect on foreclosure proceedings it should be resolved as soon as possible by this Court.

Respectfully submitted,

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APPENDIX I.

OPINIONS OF LOWER COURTS (formal parts omitted)

OPINION OF THE TRIAL COURT
MEMORANDUM ON DECISION

This is a real estate mortgage foreclosure action with the plaintiff seeking foreclosure of a mortgage upon its complaint as to one property and the defendants Andy and Violet Johnson seeking foreclosure of two mortgages upon their cross complaint as to the same property and two other properties of the defendant Charles Henneman Company, an insolvent debtor. In turn the defendant United States of America by counterclaim makes claim for tax lien priority against all the mortgaged property, and Chippewa County by its answer makes claim for lien priority as to real estate taxes accruing since the filing of notice of the United States lien. During the pendency of the action the entire property has been sold pursuant to stipulation of the parties and the sale proceeds substituted for the parts thereof.

Under the facts found in this case the amount of the United States tax lien far exceeds the total sum realized from the sale of the debtor's property. Hence, application of the general priority which the United States has for taxes would leave nothing for the other lien claimants. Extensive briefs submitted on behalf of the United States support that result.

This view fails to give effect to Section 3672 of Title 26, United States Code, as it existed at the time in question which can only be considered as an amendment to the absolute priority of the United States and as a surrender of such priority to the extent required to pay existing mortgages. Thereupon the question arises whether a priority

for payment of real estate taxes arises as against the mortgage interests. If it does, the priority to the mortgages under the statute is largely absorbed because such taxes are against the whole property including that taken by the federal government under the lien which in turn is prior to that for real estate taxes. This has been described as a circular priority of liens and is much discussed in briefs submitted by counsel in this case.

It is not apparent how in the circumstances present the rights of lien claimants which are completely overriden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage there is nothing after the mortgage to which such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that.

Among the contentions advanced in briefs of counsel is that the mortgagees should even now be permitted to pay the real estate taxes and add the amount thereof to the mortgage debt. As herein indicated that is not necessary to maintain the preferred position of the mortgages, and it is most doubtful whether such procedure could be sustained as against the federal lien.

The dispute with reference to the erroneous description of premises mortgaged in Lot 1 of Block 5 of Mansfield's Addition and the correction thereof by subsequent mortgage so as to cover the north half instead of the east half of the lot is quite academic. In any event the erroneous description covers half of the premises intended and the proceeds from additional premises covered by this mortgage are more than adequate to pay the debt. Even so, the intention to mortgage the half of said lot which the

mortgager owned is clear, and the correction mortgage thereon must be given full effect.

OPINION OF THE WISCONSIN SUPREME COURT

Appeal from a judgment of the circuit court for Chippewa County: Clarence E. Rinehard, Circuit Judge. *Reversed.*

An action to foreclose three real estate mortgages. The plaintiff is seeking foreclosure of a mortgage upon its complaint as to one property and the defendants, Andy and Violet Johnson, are seeking foreclosure of two mortgages upon their cross complaint as to the same property and two other properties of the defendant Charles Henneman Company, an insolvent debtor. The United States of America by counterclaim makes claim for tax lien priority against all the mortgaged property, and Chippewa county by its answer makes claim for lien priority as to real estate taxes accruing since the filing of notice of the United States lien. During the pendency of the action the entire property has been sold pursuant to stipulation of the parties and the sale proceeds and all moneys are now held by the clerk of the circuit court.

Under the facts found in this case the amount of the United States tax lien far exceeds the total sum realized from the sale of the debtor's property.

During the insolvency proceedings and pursuant to stipulation of the parties in the foreclosure action, an order was entered on April 26, 1955, directing that the real estate be sold by Frank Hauptmann, assignee and receiver in the insolvency proceedings for the price of $60,500, free of all liens of the parties, and that the proceeds of said sale be substituted in the foreclosure for the real estate itself. The order further provided for the payment of said

sum of $60,500 to the clerk of court to be held by him under such conditions and restrictions as the Court shall direct and to abide the outcome and final determination and judgment in this action. Also in accordance with the stipulation of the parties that he pay from such sum one-third of the 1955 real estate taxes on such properties to be charged pro-rata against funds as allocated to each property on the sale thereof and the clerk on February 2, 1956, paid taxes accordingly in the amount of $900.40 and retains the balance of the sale proceeds in the form of United States savings bonds.

The Court found that pursuant to Sec. 3672, 26 U. S. C. A., Int. Rev. Code (1939), now Sec. 6323, the plaintiff and the defendants Andy and Violet Johnson are entitled to receive from the money so held by the clerk the amounts due for principal, interest, costs and attorneys' fees under the respective mortgages.

The Court entered judgment as follows: That there was due and owing to the plaintiff on June 20, 1959, under the note and mortgage the sum of $6,121.36, principal, $1,525.69, interest, together with attorneys' fees as provided in said mortgage in the sum of $350, and $162.10 being the taxable costs and disbursements in this action, the total being $8,159.15 together with interest on the same at the rate of four and one-half per cent per annum from June 20, 1959. It found that there was due and owing to Andy Johnson and Violet Johnson as of June 20, 1959, principal and interest on the note and mortgage of February 9, 1948, the sum of $24,893.32, attorney's fees $650, taxable costs and disbursements $100, and that there was due and owing defendants Andy and Violet Johnson as of June 20, 1959, on the note and mortgage dated February 13, 1951, the sum of $1,137.70, attorney's fees $100, a total

of the aforesaid sums of $26,881.02, together with interest thereon at the rate of four per cent per annum from the 20th day of June, 1959, until paid.

The Court ordered the clerk to pay these respective sums to the plaintiff and defendants Andy and Violet Johnson out of funds remaining in his hands from the sale of the mortgaged premises, and further adjudged that the clerk pay to the Internal Revenue Service of the United States the balance of the proceeds of the sale of the mortgaged premises remaining in his hands.

It is from this judgment that the defendant Chippewa County appeals.

DIETERICH, J. The Charles Henneman Company executed and delivered to the First National Bank of Chippewa Falls on January 6, 1948, its promissory note in the amount of $35,000 secured by a first mortgage on lots four, five and six, block nine, Allen's Addition to the City of Chippewa Falls. The mortgage was recorded in the office of the register of deeds for Chippewa County on January 9, 1948.

On February 9, 1948, the Charles Henneman Company executed and delivered its promissory note in the amount of $20,000 to Andy Johnson and Violet Johnson. The note was secured by a mortgage on lots four, five and six, block nine, Allen's Addition, lot eight, block five, Allen's Addition and the east one-half of lot one, block five, Mansfield's Addition. This mortgage was recorded in the register of deeds' office in the County of Chippewa on February 10, 1948.

On October 29, 1951, another mortgage was executed for $20,000 to Andy Johnson and Violet Johnson, which recited:

> "The north half of lot one, block five, Mansfield's Addition to the City of Chippewa Falls.

"This mortgage is given to correct the description as to the above described mortgaged premises which were erroneously described as the east half of lot one, block five, in that certain mortgage between the same parties, dated February 9, 1948, and recorded in the office of the register of deeds for Chippewa County, in Volume 154 of mortgages, page 43, document no. 247938."

This corrected mortgage was recorded in the office of the register of deeds of Chippewa County on November 2, 1951.

The United States of America filed a tax lien on April 20, 1951, with the register of deeds of Chippewa County against the real estate of the Charles Henneman Company in the amount of $96,827.82, pursuant to the provisions of the Internal Revenue Code.

The pleadings disclose that Frank Hauptmann was appointed assignee under the provisions of the Wisconsin insolvency statutes on January 11, 1954. The foreclosure proceedings were commenced on May 14, 1954.

The following stipulation was filed as a part of the foreclosure proceedings:

"It is hereby stipulated in this assignment for benefit of creditors proceedings, by the undersigned, who are parties plaintiff and defendant respectively in the action of foreclosure in this Court entitled The First National Bank of Chippewa Falls, a corporation, v. Chas. Henneman Co., et al., which is now pending, that the sale by the assignee for benefit of creditors, namely, Frank Hauptmann, of all of the remaining assets, real and personal, of the Chas. Henneman Co., for the total sum of $62,500 is hereby approved, and the funds to be allocated as to selling price as follows:

"Lots four, five and six, block nine, Allen's Addition to the City of Chippewa Falls	$49,000
Lot eight, block five, Allen's Addition to the City of Chippewa Falls	4,500
North one-half of lot one, block five, Mansfield's Addition to the City of Chippewa Falls	7,000
All remaining personal property	2,000
	$62,500

"It is stipulated and agreed that the sales proceeds of the real estate aforementioned, shall be substituted in the said foreclosure action for the real estate itself, with the parties to the said action having the same priorities, liens and rights in such proceeds as they would have had in said real estate.

"It is further understood and agreed that this stipulation is contingent upon the release by the proper governing authority of Chippewa County, Wisconsin, of its tax liens which have accrued or will accrue through its purchase of the tax certificates covering the aforesaid real estate covering the years 1951 and subsequent thereto, substituting the sales proceeds aforementioned in place of the real estate, the said county having the same priority, lien and rights in such proceeds as it would have had in the said real estate; and that the City of Chippewa Falls, Chippewa County, Wisconsin, shall release by proper governing authority, any tax lien it may have on the aforesaid real estate, substituting its claim against the sales proceeds of the real estate aforementioned, the said city to have the same priority, lien and rights in such proceeds, as it would have in the real estate.

"It is understood and agreed that the aforesaid offer of purchase and acceptance thereof by the said assignee for benefit of creditors provides that the said sale shall be closed on or before April 30, 1955, and if sale is not completed by that date the offer shall be null and void. In event of failure to close said sale by April 30, 1955, then this stipulation shall have no force and effect and shall be cancelled. It is understood and agreed that Frank Hauptmann, assignee for benefit of creditors, will, in accordance with the requirements of the Wisconsin law, pay the pro-rata share of the real estate taxes on the aforementioned real estate for the current year up to the time of conveyance by deed and transfer of possession to the purchasers. It is understood that this payment is without prejudice as to any claim of priority of the United States income excess profits and declared value excess profits tax lien and is made solely for the purpose of getting a record title to the real estate which is merchantable at the earliest possible date.

"Chas. Henneman Co., itself and by Frank Hauptmann, its assignee for benefit of creditors, does, in consideration of the foregoing agreement, waive any and all equity of redemption it may have in the aforesaid real estate and does expressly approve the said sale."

Pursuant to said stipulation, the Court entered the following order directing sale:

"In accordance with the stipulation on file herein, executed by Charles Henneman Co., Andy Johnson and Violet Johnson, the United States of America and Frank Hauptmann, as assignee for the benefit of creditors of Charles Henneman Co., either personally

or by their respective attorneys and in accordance with a resolution passed by the county board of supervisors, Chippewa County, Wisconsin.

"Now, therefore, on motion of the attorneys for each and all of the parties,

"It is ordered and directed that the real estate which is the subject of this foreclosure by the plaintiff and the defendants, Andy Johnson and Violet Johnson, be sold to Albert Perrenoud, Howard H. Post, Norman J. Nelson and Arthur R. Perrenoud, for the total price of $60,500, free and clear of any and all liens of The First National Bank of Chippewa Falls, the United States of America, Andy Johnson and Violet Johnson and said Chippewa County, the funds of said selling price to be allocated * * * (as set forth above).

"The said sales proceeds from the real estate aforementioned, based on aforesaid allocation of value, shall be substituted in this foreclosure action for the real estate itself, with each of the parties to this action having the same priorities, liens and rights in said proceeds as they, it, he or she would have had in the aforesaid described real estate.

"Further it is ordered that the said sum of $60,500 shall be paid over to John Ritzinger, clerk of this Court, to be held by him under such conditions and restrictions as the Court shall direct and to abide the outcome and final determination and judgment in this action.

"In accordance with the terms of the stipulation referred to above, the said clerk of court, at such time as the 1955 real estate taxes are determined and levied on aforesaid real estate, shall pay one-third of the 1955 tax thereon as the pro-rata share of seller, in

accordance with the sales agreement. Said expense to be a charge pro-rata against the funds as allocated above."

The following receipt dated July 6, 1955, was executed by the clerk of the circuit court for Chippewa County:

"Received of Frank Hauptmann, receiver of Charles Henneman Co., the sum of $60,500, with which I agree to purchase U. S. Savings bonds in said amount; the bonds to be held by me and my successors in office to abide the judgment of the Court in this action as to disposition of said funds.

"Further agreed that the bonds shall be placed for safe keeping with W. O. Kelly, Chippewa County treasurer and his successors in office and the actual control over the said bonds shall be joint with said Chippewa County treasurer."

The only question on the appeal before this Court is the allocation and distribution of the amount of $60,500 in government bonds in the possession of the clerk of the circuit court from the sale of the real estate on the basis of priority of the respective mortgagees, United States government tax lien and the Chippewa County delinquent real estate taxes.

Priority of mortgages and federal tax lien

The priority of the federal tax lien is controlled exclusively by federal law. The Charles Henneman Company was insolvent and an assignee and receiver had been appointed under the Wisconsin insolvency statute prior to the foreclosure proceedings. The stipulation provided that the sales proceeds of the real estate be substituted in the foreclosure action for the real estate itself, with the parties to have the same priorities, liens and rights in such proceeds as they would have had in the real estate.

Sec. 3670, 26 U. S. C. A., Int. Rev. Code, provides:

"*Property subject to lien.* If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448."

Sec. 3672, 26 U. S. C. A., Int. Rev. Code, provides:

"*Validity against mortgagees, pledgees, purchasers, and judgment creditors.*

"(a) *Invalidity of lien without notice.* Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector.

"(1) *Under state or territorial laws.* In the office in which the filing of such notice is authorized by the law of the state or territory in which the property subject to the lien is situated, whenever the state or territory has by law authorized the filing of such notice in an office within the state or territory; * * *."

In United States v. New Britain (1954), 347 U. S. 81, 88, 74 Sup. Ct. 367, 98 L. Ed. 520, the Court said:

"The United States is not interested in whether the state receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien."

See: Michigan v. United States (1943), 317 U. S. 338, 63 Sup. Ct. 302, 87 L. Ed. 312.

Under the present status of the federal law the federal tax lien attaches to all property belonging to the taxpayer and although the determination of property rights belonging to the taxpayer is a matter of application of state law, the priority of a government lien against such property is controlled by federal law. In the New Britain case, supra, the United States Supreme Court established the principle of "first in time, first in right," and the federal statutes specifically provide that the government lien shall not be valid as against liens filed prior to the filing of the notice by the collector. Sec. 3672, 26 U. S. C. A., Int. Rev. Code. Therefore, where, as here, there is a mortgage, recorded pursuant to state law prior to the recording of the federal tax claim, then the government can only resort to those proceeds from the sale of the property which are in excess of the mortgage indebtedness for satisfaction of its lien. River Rouge Savings Bank v. Victor Building Co. (1960), — Mich. —, 101 N. W. 2d 260.

It may be stated at this point that the mortgage of the Johnsons' recorded on the 29th day of October, 1951 (the original mortgage being recorded subsequent in point of time to the notice filed by the government) merely corrected the description of the real estate, no consideration having passed at that time. The record discloses that it was the clear intent of the Charles Henneman Company to secure the loan from the Johnsons by a mortgage on the north one-half of the lot owned by the company and not by the property described in the original mortgage to the Johnsons which property the company never owned.

The priority of the government's lien is only as to the excess of sale price over and above the sums due the First National Bank of Chippewa Falls and the Johnsons by virtue of their prior recorded mortgages. After the amount available to apply on the federal tax lien has been set

aside, state law is then applicable to determine the priorities between the mortgages and the real estate tax sale certificates. Samms v. Chicago Title & Trust Co. (1953), 349 Ill. App. 413, 111 N. E. 2d 172; River Rouge Savings Bank v. Victor Building Co., supra. See for a discussion of the problem: 13 The Business Lawyer (1958 No. 4), Certain Aspects of the Priority of Tax Liens, p. 642; American Bar Asso. Sec. of Taxation (1959 meeting), Report of the Committee on Federal Tax Liens and Collection Proceedings, p. 149; 83 Reports of American Bar Asso. (1958), Report of the Special Committee on Federal Liens, p. 454.

Distribution of the proceeds of the sale price in the hands of the clerk of the circuit court.

The trial court shall determine and set aside out of the proceeds of the sale price the total sum due and owing to the first mortgagee, First National Bank of Chippewa Falls, and the mortgagees, Andy Johnson and Violet Johnson, plus their respective interest, taxable costs, disbursements and attorneys' fees. The balance of said money shall be paid to the United States Government as and for complete liquidation of its lien and claim for unpaid federal taxes.

There being nothing left for distribution in so far as the real estate tax lien is concerned under the federal law, we now apply the state law as to priorities as between the First National Bank of Chippewa Falls, mortgagees, Andy and Violet Johnson, mortgagees, and Chippewa county real estate tax lien.

Priorities as between mortgagees and real estate tax liens under state law

Sec. 70.01, Stats. 1951, provides:

"*General property taxes; upon whom levied.* Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. Real estate taxes shall be deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection. When so levied such taxes shall be a lien upon the property against which they are assessed, superior to all other liens, effective as of May 1 in the year when levied, * * *."

"70.02, *Definition general property.* General property is all the taxable real and personal property defined in Sections 70.03 and 70.04 * * *."

"70.03, *Definition real property.* The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto."

"70.10, *Assessment, when made.* The assessor shall begin as soon as practicable after the April election, if he is elected at such election, otherwise as soon as practicable after January first to assess all the real estate and personal property as of the close of the first day of May in each year. * * *."

"70.17, *Lands, to whom assessed; buildings on exempt lands.* Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or

certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Improvements on leased lands may be assessed either as real property or personal property."

"70.32. *Real estate, how valued.* (1) Real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. * * *."

This Court has held in Will of Koehring (1939), 230 Wis. 533, 538, 284 N. W. 523:

"* * * in the absence of a clear and unambiguous statute specifically denying the state's right of priority, its right thereto exists as to all taxes by virtue of the common law."

The amended complaint discloses that the real estate taxes assessed for the years 1951, 1952 and 1953, were outstanding and unpaid.

In Fitch v. Wisconsin Tax Comm. (1930), 201 Wis. 383, 230 N. W. 37, this Court said:

"In the very opening sentence of Cooley on Taxation (3d ed.) we find it stated that 'Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. The State demands and receives them from the subjects of taxation within its jurisdiction that it

may be enabled to carry into effect its mandates and perform its manifold functions, and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society. The justification of the demands is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes.'

"The exaction of a tax can only be justified from one who is enjoying the protection of government either for himself or for his property."

The entire real estate, including all mortgagors and mortgagees interests in it, is assessed against the property as one unit, as defined in the statute and the rights of every person claiming any interest in the property by virtue of any lease, contract, mortgage or otherwise, is subject to the unpaid real estate tax liens. Aberq v. Moe (1929), 198 Wis. 394, 224 N. W. 132, 226 N. W. 301.

Sec. 70.01, Stats., accords priority to general property taxes and when levied such tax liens have priority over all other liens which would include recorded mortgages. River Rouge Savings Bank v. Victor Building Co., supra. Will of Koehring, supra.

It therefore follows that the mortgage interests of the First National Bank of Chippewa Falls and Andy Johnson and Violet Johnson are subject to the payment of the outstanding taxes.

The trial court shall determine the amount of real estate taxes due and unpaid on lots four, five and six, block nine, Allen's Addition, and they shall be paid in inverse

order so as to maintain the integrity of the first mortgage. In other words, the taxes shall be paid out of the moneys set aside for the second mortgage and if such sum is not sufficient such remaining balance shall be paid out of the sums of money held for payment of the first mortgagee. The remainder of the properties are covered by a first mortgage held by the Johnsons, and are subject and chargeable for the taxes due on each respective parcel. Inasmuch as the proceeds of sale have been substituted for the land, any rights of subrogation of any of the parties should be preserved in the judgment. All rights to redeem from the sale of the mortgaged lands have in effect been waived by the stipulation.

The judgment of the trial court is reversed, with instructions to enter judgment in accordance with this opinion.

By the Court—Judgment reversed, with instructions for the trial court to enter judgment in accordance with this opinion.

APPENDIX II.

TEXT OF STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions.

Article XIV, Sec. 1, United States Constitution:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. United States Statutes Involved.

28 U. S. C. 1257(3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari; where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

26 U. S. C. 3670:

"Property subject to lien. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person"

26 U. S. C. 3672:

"Validity against mortgagees, pledgees, purchasers, and judgment creditors. (a) Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditors until notice thereof has been filed by the collector— (1) Under State or Territorial laws. In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *".

26 U. S. C. 3704(c)(2):

"If the proceedings of the secretary, or his delegate as set forth have been substantially in accordance the provisions of law, such deed shall be considered, and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto."

III. Wisconsin Statutes Involved:

1951, Sec. 70.01:

"*General property taxes; upon whom levied.* Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. Real estate taxes shall be deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection. When so levied such taxes shall be a lien upon the property against which they are assessed, superior to all other liens, effective as of May 1 in the year when levied. * * *"

1951, Sec. 70.02:

"*Definition general property.* General property is all the taxable real and personal property defined in Sections 70.03 and 70.04 * * *."

1951, Sec. 70.03:

"*Definition real property.* The terms 'real property', 'real estate' and 'land', when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto."

1951, Sec. 70.10:

"*Assessment, when made.* The assessor shall begin as soon as practicable after the April election, if he is elected at such election, otherwise as soon as practicable after January first to assess all the real estate and personal property as of the close of the first day of May in each year * * *."

1951, Sec. 70.17:

"*Lands, to whom assessed; buildings on exempt lands.* Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Improvements on leased lands may be assessed either as real property or personal property."

1951, Sec. 70.32(1):

"*Real estate, how valued.* (1) Real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale * * *."

1951, Sec. 278.10(4):

"Foreclosure. (4) The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof."

APPENDIX III.

EXCERPTS FROM RECORD SHOWING WHERE FEDERAL QUESTIONS WERE RAISED

JOHNSONS' ANSWER AND CROSS-COMPLAINT

"18 * * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defendants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees; * * *"

"* * * that after payment of the amounts due plaintiff, these defendants be paid out of the proceeds the amounts adjudged and determined to be owing them * * *."

"* * * that this Court adjudge and determine the right of the plaintiff and these defendants under the terms of their respective mortgages to pay the real estate taxes on the mortgaged premises accruing subsequently to the effective date of the lien of the United States of America * * *."

BANK'S SECOND AMENDED COMPLAINT

"* * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorney's fees and such additional amounts as the plaintiff may advance for payment of taxes * * *."

JOHNSONS' TRIAL COURT BRIEF

"* * * the defendants Johnsons stand ready to pay the taxes if they can claim the protection of the claim in their mortgages * * *."

"Consequently, the defendants Johnsons submit that they have the contractual right to pay the delinquent real estate taxes and add such amounts so paid to the amount of their mortgage indebtedness, which is entitled to priority against the Government, under Section 2672, or, in the alternative, that, if such mortgagees cannot obtain for such payment of delinquent real estate taxes the same priority as the mortgage indebtedness is entitled to under Section 3672, then the municipality cannot constitutionally overleap the intervening Government lien and take from the mortgagee that portion of the mortgagees' security which equals the amount of the delinquent real estate taxes.

"These mortgagees offer another suggestion for the consideration of the Court. We are dealing with equitable principles, and the mortgagees contend that if they have to pay real estate taxes out of their mortgage funds, such taxes should be based upon the mortgagees' share of the real estate, and not on the entire assessed valuation of the real estate. This lawsuit demonstrates very clearly that, after deducting the mortgagees' share of the real estate, the balance of the real estate actually belongs to the United States. The United States does not have title to the real estate, because it has not foreclosed its lien; and, therefore, technically the local municipality might still have some legal basis for assessing real estate taxes; but, it does not have any equitable basis for

requiring the mortgagees to pay taxes on the entire assessed valuation. The application of this principle is important with reference to the principal piece of property. As to the other two pieces of property, there would be no argument. However, on the principal piece of property, the balance owing the plaintiff and the defendants Johnsons would approximate $16,000.00; whereas, the property has an assessed valuation of some $90,000.00. Where everything beyond the $16,000.00 belongs to the United States Government, why should not a court of equity limit the municipality's recovery of delinquent real estate taxes to that based upon the amounts owing on the first and second mortgages?"

COUNTY'S TRIAL COURT BRIEF

"* * * the proposition about to be discussed by this author has been well discussed by Mr. Wiley, counsel for the defendants Johnson, as to the Court's permitting the mortgagees to pay the real estate taxes; and this writer concurrs (sic) with the argument made there and that which is said here is merely in addition to, or emphasis upon, what has been said there * * *."

BANK'S TRIAL COURT BRIEF

"* * * However, the solution which seems best, is the last discussed—that of letting the mortgagees pay the real estate taxes and add that amount to their debt * * *."

"plaintiff, therefore, believes that this Court should adopt a solution which treats the first mortgagee as fairly and equitable (sic) as possible. Although any

of the proposed solutions might apply, the fairest one, and the one which conforms most closely to the law, is to allow the mortgagees to pay the real estate taxes and add them to their debt * * *."

COUNTY'S SUPREME COURT BRIEF

"Section 278.10(4) provides that the Court may order in the judgment of foreclosure that all sums advanced by the plaintiff for taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof. The county, by obtaining an assignment of the judgment, could claim this right to add the taxes to the judgment."

"* * * In the present case the federal government contended that the income tax lien was prior to the mortgages. If this were true, the mortgagees could not add taxes to their liens, and the defendant county could not afford to buy the judgment. The defendants had the right to wait until the Court ruled on this contention, before deciding whether their rights of subrogation and redemption were of any value."

JOHNSONS' SUPREME COURT BRIEF

"* * * While the United States Supreme Court has not ruled on this specific point (see United States v. New Britain, supra, page 88) some federal courts have held that mortgagees cannot add local tax payments to the mortgage at the expense of the Government.

"* * * These respondents call the Court's attention to the provisions of their mortgages allowing them to pay the taxes (Exs. 4, 5, R. 146, 147; A. App. 147, 151). Respondents call particular attention to the

language in Exhibit 4, the mortgage they hold on the business site, that they are authorized to 'expend any sum of money necessary to preserve the lien of said mortgagee upon said premises, in payment of taxes (insurance money), or otherwise * * *' (R. 146, A. App. 147). These respondents submit that if the County has to be paid out of the mortgage interest, then the Fifth Amendment of the United States Constitution will require the Supreme Court of the United States to hold that the mortgagees are entitled to reimbursement out of the proceeds of the sale of the land ahead of the Government. The alternative is for that Court to hold that the State of Wisconsin cannot require the mortgagee to pay subordinate local taxes based on the assessed valuation of the mortgagor's interest, as well as the mortgagee's."

BANK'S SUPREME COURT BRIEF

"* * * Appellant argues that if the mortgagees lose their interest here it is due to their own fault, first, because they should have paid the county's taxes and added them to their mortgage debt as against the Federal Government, and, second because they should have foreclosed as soon as possible.

B. *There is a conflict in the decisions of the federal courts as to whether or not a mortgagee may pay local real estate taxes at the expense of the federal lien.*

On the argument that the mortgagees could pay the county taxes at the expense of the Federal lien, there is a conflict in the decisions of the Federal courts of appeal, which probably means that a decision by this Court allowing the mortgagees to pay the taxes

would be appealed to the United States Supreme Court * * *."

"* * * In this case, after the Federal lien attached to the property, there were two interests in the property —the mortgagees, and the federal government. The federal government owned the Henneman Company's interest. Concededly, the state cannot tax the Federal government's interest. It is also obvious that the state *does not* tax the mortgagee's interest, although it could. How then can there be any lawful tax levied after. March 21, 1951, when the federal lien attached? * * *"

"* * * In summary, then, we submit that when the Federal lien attached to the property the Federal government became the owner of the Henneman Company's interest. The Federal government is exempt from the County tax. State law does not pretend to tax a mortgagee's interest separately. Therefore, no tax can be levied.

If any tax can be constitutionally levied, it can only be a tax based on the sale value of the mortgagee's interest. * * *"

APPENDIX IV.

JUDGMENT OF TRIAL COURT PURSUANT TO SUPREME COURT MANDATE

JUDGMENT

This action having been tried before the Court at the October, 1954, term of said court, with Ingolf E. Rasmus appearing for the plaintiff, Marshall A. Wiley appearing for the defendants Andy Johnson and Violet Johnson, George E. Rapp, United States Attorney, appearing for the defendant United States of America, Marshall Norseng appearing for the defendant Frank Hauptmann, receiver of Charles Henneman Company, and Eugene R. Jackson, District Attorney, appearing for Chippewa County, and the Court having made and entered findings of fact and conclusions of law, which are of record herein, and having entered judgment on July 8, 1959, and Chippewa County having appealed from the whole of said judgment to the Supreme Court of the State of Wisconsin, by which court the said judgment was on the 3rd day of May, 1960, reversed and remanded with instructions for the trial court to enter judgment in accordance with the opinion of the Supreme Court; and due notice of such remittance and of application for this judgment having been given, and proof of such notice having been filed,

And the motion of Chippewa County for judgment in accordance with the mandate of the Supreme Court having come on to be heard on this 19th day of July, 1960, and Chippewa County having appeared by Eugene R. Jackson, District Attorney, and John Frampton, Special Counsel, and the First National Bank of Chippewa Falls having appeared by James B. Halferty, its attorney, Andy Johnson and Violet Johnson having appearing in person

and by Marshall A. Wiley, their attorney, and the United States of America having appeared by George E. Rapp, United States Attorney, appearing by Robert J. Kay, Assistant United States Attorney, and there being no appearance by Charles Henneman Company or Frank Hauptmann as receiver of Charles Henneman Company, and the Court having determined that the amounts due and owing to the First National Bank of Chippewa Falls on its mortgage against Lots 4, 5 and 6, Block 9 of Allen's Addition are as follows:

Principal	$6,121.36
Interest	1,825.69
	$7,947.05
Solicitor's Fees	350.00
Taxable Costs	162.10
Total	$8,459.15

and that the amounts due and owing to Andy Johnson and Violet Johnson on the mortgage which is a second mortgage on Lots 4, 5 and 6, Block 9, Allen's Addition, and a first mortgage on Lot 8, Block 5, Allen's Addition, and the N½ of Lot 1, Block 5, Mansfield's Addition, are as follows:

Principal	$20,000.00
Interest	5,755.56
	$25,755.56
Solicitor's fees	650.00
Taxable costs	100.00
Total	$26,505.56

and the amounts due and owing Andy and Violet Johnson on their second mortgage against Lot 8, Block 5 are as follows:

Principal	$ 900.00
Interest	276.60
	$1,176.60
Solicitor's fees	None
Taxable costs	100.00
	$1,276.60

and that the amounts due and owing to Chippewa County for real estate taxes, including interest for the month of July, 1960, are as follows:

Lots 4, 5 and 6, Block 9	
Taxes	$14,346.23
Interest	9,674.59
Total	$24,020.82
Lot 8, Block 5	
Taxes	$ 758.20
Interest	509.77
Total	$1,267.97
N½ Lot 1, Block 5	
Taxes	$ 766.92
Interest	518.16
Total	$1,285.08

and that the total amounts due and owing to the mortgagees are as follows:

Bank mortgage	$ 8,459.15
Johnson Mortgage No. 1	26,505.56
Johnson Mortgage No. 2	1,276.60
	$36,241.31

and the clerk having informed the Court that the proceeds of sale of the mortgaged premises, which were in the amount of $59,599.60, have increased to the sum of $66,-881.52, and it therefore appearing that the balance to be allocated to the United States on its tax lien is the difference, namely:

Fund held by clerk	$66,881.52
Due on mortgages	36,241.31
United States	$30,640.21

and it further appearing to the Court that the fund should be allocated to the mortgaged premises as follows:

	Original	Now
Lot 8	$ 4,438.13	$ 4,980.39
Lot 1	6,933.60	7,780.76
	$11,371.73	$12,761.15
Lot 4, 5 & 6	48,227.87	54,120.37
	$59,599.60	$66,881.52

and it appearing to the Court that the total amount owing on the Johnson mortgages against Lots 1 and 8 exceeds the total amount allocated to those parcels, and that the entire proceeds of Lots 1 and 8 should first be applied against the total due on the Johnson mortgages in order to

determine the amount remaining to be set aside for the Johnson mortgage from the proceeds of Lots 4, 5 and 6, as follows:

Johnson mortgage No. 1	$26,505.56
Johnson mortgage No. 2	1,276.60
Total	$27,782.16
Proceeds Lot 8	4,980.39
	$22,801.77
Proceeds Lot 1	7,780.76
Balance from Lots 4, 5 and 6	$15,021.01

and it therefore appearing that the amounts set aside for the mortgagees from the three parcels are as follows:

Lot 8, Johnsons	$ 4,980.39
Lot 1, Johnsons	7,780.76
Lots 4, 5 and 6, Bank	8,459.15
Lots 4, 5, 6, Johnsons	15,021.01
Total for mortgagees	$36,241.31

and that in order to preserve the integrity of the Bank's first mortgage as to Lots 4, 5 and 6, the Johnsons' share of the proceeds of these lots must first be resorted to for payment of the real estate taxes, as follows:

Taxes Lots 4, 5 and 6	$24,020.82
Johnsons' share (to County)	15,021.01
Balance of Tax	$8,999.81
Bank's share (to County)	8,459.15
Tax not collectible	$ 540.66

and it appearing that the amounts set aside for the Johnson mortgages from Lots 8 and 1 will be sufficient to pay the terms on those lots, leaving amounts payable to the Johnsons as follows:

Set aside, Lot 8	$4,980.39
Less tax to County	1,267.97
Difference to Johnsons	$3,712.42
Set aside, Lot 1	$7,780.76
Less tax to County	1,285.08
Difference to Johnsons	$6,495.68

and it therefore appearing that in accordance with the mandate of the Supreme Court the fund of $66,881.52 in the hands of the clerk should be distributed as follows:

		United States	County	Johnsons
United States	$30,640.21	$30,640.21		
County	1,267.97		$ 1,267.97	
Johnsons	3,712.42			$ 3,712.42
County	1,285.08		1,285.08	
Johnsons	6,495.68			6,495.68
County	15,021.01		15,021.01	
County	8,459.15		8,459.15	
	$66,881.52	$30,640.21	$26,033.21	$10,208.10

SUMMARY

United States	$30,640.21
Chippewa County	26,033.21
Johnsons	10,208.10
First National Bank	None
	$66,881.52

Now, therefore, on motion of Eugene R. Jackson, District Attorney, and John Frampton, Special Counsel,

It is adjudged that there is now due and owing to the First National Bank of Chippewa Falls, on its mortgage against Lots 4, 5 and 6, Block 9 of Allen's Addition to the City of Chippewa Falls, as of the 19th day of July, 1960, the sum of $6,121.36 principal and the sum of $1,825.69 interest, together with $350.00 solicitor's fees as provided in said mortgage, and $162.10 being the taxable costs and disbursements in this action, amounting in all to the sum of $8,459.15.

It is further adjudged that there is now due and owing to Andy Johnson and Violet Johnson on their mortgage against Lots 4, 5 and 6, Block 9, Allen's Addition, and against Lot 8, Block 5, Allen's Addition, and the North Half of Lot 1, Block 5, Mansfield's Addition, the sum of $20,000.00 principal and the sum of $5,755.56 interest, together with $650.00 solicitor's fees and $100.00 taxable costs in this action, amounting in all to the sum of $26,505.56.

It is further adjudged that there is now due and owing to Andy Johnson and Violet Johnson on their mortgage against Lot 8, Block 5, Allen's Addition to the City of Chippewa Falls, the sum of $900.00 principal and $276.60 interest, together with $100.00 taxable costs in this action, amounting in all to the sum of $1,276.60.

It is further adjudged that pursuant to stipulation of the parties to this action, the proceeds of sale of the mortgaged premises have been substituted for the land and that Lot 8 is now represented by the sum of $4,980.39 in the hands of the clerk and the North Half of Lot 1 is now represented by the sum of $7,780.76 in the hands of the clerk and that Lots 4, 5 and 6 are now represented by the sum of $54,120.37 in the hands of the clerk, and that the entire fund now amounts to $66,881.52.

It is further adjudged that the amounts due and owing to Chippewa County for delinquent real estate taxes on Lots 4, 5 and 6 are $14,146.23 taxes and $9,674.59 interest, in all the sum of $24,020.82, and that the amounts due and owing to Chippewa County for delinquent real estate taxes on Lot 8 are $758.20 taxes and $509.77 interest, in all the sum of $1,267.97, and that the amounts due and owing to Chippewa County for delinquent real estate taxes on the North Half of Lot 1 are $766.92 taxes and $518.16 interest, in all the sum of $1,285.08.

It is further ordered and adjudged that from the fund in his hands the clerk shall, at the expiration of ten days after the date of entry of this judgment, pay to the Internal Revenue Service of the United States the sum of $30,640.21 and to Chippewa County the sum of $26,033.21 and to Andy Johnson and Violet Johnson the sum of $10,208.10.

It is further ordered that in the event of any further increase in the fund prior to payment, application shall be made to the Court for an order relative to the disposition of such increase.

It is further ordered that within the period of ten days after the date of entry of this judgment, any party to this action may exercise the right of subrogation.

Dated July —, 1960.

By the Court:
Clarence E. Rinehard,
Circuit Judge.

COPY

No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1960

FIRST NATIONAL BANK OF CHIPPEWA FALLS, ET AL.,
PETITIONERS

v.

CHARLES HENNEMAN COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
A. F. PRESCOTT,
DAVID O. WALTER,
Attorneys,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum decision of the trial court (Pet. 1a–3a) is not officially reported. The opinion of the Wisconsin Supreme Court (Pet. 3a–17a) is reported at 10 Wis. 2d 260.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on May 3, 1960 (R. 247). The petition for a writ of certiorari was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether state or local real estate taxes may be levied and collected on the full market value of property which is subject to a federal tax lien, when there are mortgages on the property prior to the federal tax lien.

2. Whether mortgagees holding mortgages prior in time to a federal tax lien may pay local real estate taxes arising after the federal tax lien is filed and obtain a priority for the amount of those taxes over the earlier federal tax lien.

STATUTES INVOLVED

The statutes involved, Sections 3670, 3671, and 3672(a) of the Internal Revenue Code of 1939, are printed in the Appendix, *infra*, pp. 8-9.

STATEMENT

This is a case arising out of a foreclosure proceeding on three parcels of property, involving the priority of three mortgages, federal tax liens, and county real estate taxes. The facts as set out in the opinion of the court below (Pet. 3a–10a) can be summarized as follows:

On January 6, 1948, the Charles Henneman Company (hereafter referred to as the Company) executed a mortgage covering certain property of the Company situated in Chippewa Falls in Chippewa County, Wisconsin (which can be referred to as Lots 4, 5, and 6) to the First National Bank of Chippewa Falls (hereafter referred to as the Bank), recorded on January 9, 1948. On February 9, 1948, the Com-

pany executed a mortgage covering the same property and two other lots, Lots 8 and N ½ of Lot 1 to Andy and Violet Johnson (hereafter referred to as the Johnsons) recorded February 10, 1948 (Pet. 5a).

The United States on April 20, 1951, filed a notice of tax lien for federal taxes, penalties and interest in the amount of $96,827.82, due from the Company, in the office of the Register of Deeds of Chippewa County (Pet. 6a). The Company failed to pay the local real estate taxes on the mortgaged property for the years 1951, 1952, and 1953 (Pet. 15a).

The Bank brought this foreclosure action, in which the other parties became defendants. The Johnsons are seeking foreclosure of their mortgage. The United States has made claim for tax lien priority against all the mortgaged property. Chippewa County seeks priority for real estate taxes accruing since the filing of the notice of the federal tax lien. By stipulation of the parties the property has been sold clear of all liens, and the proceeds are held in substitution for the property (Pet. 3a).

On these facts the trial court concluded that the lien of the United States for federal taxes under Sections 3670 and 3671 of the Internal Revenue Code of 1939 extended to the entire sales proceeds, substituted in the foreclosure action for the real estate, but that by virtue of Section 3672 the Bank and the Johnsons were entitled to receive from the proceeds the amount due for principal, interest, costs, and attorney's fees under their respective mortgages, leaving the remainder for payment on the United States tax lien and nothing for payment on the real estate taxes (Pet.

4a–5a). As between the county and the mortgagees, the trial court in its decision reasoned that the state taxes were completely overridden by the federal tax lien, which encompassed the entire proceeds, leaving "nothing after the mortgage to which such taxes can attach." (Pet. 2a.) The court further stated that it was therefore unnecessary to decide whether the mortgagees could pay the taxes and thereby enlarge their lien as against the United States, and that such procedure was "most doubtful." (Pet. 2a.)

The Supreme Court of Wisconsin affirmed the trial court in giving priority over the federal tax lien to the mortgagees for the principal amounts, interest, costs, disbursements, and attorneys' fees,[1] and in awarding the balance to the United States ahead of the local taxes (Pet. 12a–13a). It stated (Pet. 11a) that the United States is not interested in whether the state receives its taxes prior to the mortgage creditors, citing *United States* v. *New Britain*, 347 U.S. 81, 88, but it held, in applying state law to those priorities, that the trial court erred in not holding that the state tax liens have priority over the mortgages (Pet. 16a–17a).

ARGUMENT

1. The first question sought to be presented by the petition is one on which the petitioner asserts (Pet. 22) there are no decisions except for the trial court in the present case. The constitutional claim was considered so insubstantial by the Wisconsin Supreme Court that it was not even mentioned in the opinion. Further-

[1] The question whether the attorneys' fees have priority over the federal tax lien was not litigated in this case.

more, the petition does not itself show that any substantial constitutional question is presented, merely stating without citation of authority (Pet. 19) that local real estate taxes may be levied only on the value of a mortgagee's interest. It does not show any conflict between the state rule and any federal statute. The petition, in short, attempts, without basis in the statutes or in decisions of the courts, to convert a purely state law question of the priority of real estate taxes over mortgages into a constitutional question. In the absence of a conflict of decision, there is, we submit, no occasion for this Court's intervention. In any event, this issue is one in which the United States has no direct interest, since its rights would not be affected by a reversal of the court below on this question.

2. The second question presented is one which has been the subject of decision by other courts, but as to which there is no conflict among the Courts of Appeals or the final state courts. Mortgage provisions or state law often give the mortgagee the power to pay local real estate taxes and add those amounts to the obligation secured by his mortgage. In the case where a mortgage is prior to the federal tax lien, and that in turn is prior to subsequently accruing state taxes, which in turn—under state law—have priority over the earlier mortgage, the question is whether a mortgagee may pay the taxes and obtain priority over the federal tax lien for reimbursement of the amount paid.

In the present case, the mortgagees did not in fact pay the local taxes, which were merely given priority in the proceeds over the mortgagees' claim, in accordance with state law. On this record, then, the issue is

the same as was specifically raised and answered by this Court unanimously in *United States* v. *New Britain*, 347 U.S. 81, 88, where this Court stated that—

> The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. * * *

Assuming, however, that the same issue is presented as if they had paid the taxes, the decision below is in accord with the other decisions on this issue. *United States* v. *Christensen*, 269 F. 2d 624 (C.A. 9); *United States* v. *Bond* (C.A. 4), decided May 31, 1960.[2] See also, *United States* v. *Wasserman*, 257 F. 2d 491 (C.A. 1). In *United States* v. *American Nat. Bank of Jacksonville*, 255 F. 2d 504 (C.A. 5), certiorari denied, 358 U.S. 835, cited in the petition (p. 24), the question of the allowability of a mortgagee's advances for taxes was not raised or considered. The case of *United States* v. *Seaboard Citizens Nat. Bank*, 206 F. 2d 62 (C.A. 4), did not involve the federal tax lien, and has been held inapplicable to this situation by the Fourth Circuit itself, in the *Bond* case.

In New York, the lower courts are divided on a closely related question, whether such local taxes may

---

[2] The question is now pending before the Supreme Court of Michigan in *Union Central Life Insurance Co.* v. *United States*, and before the Illinois Appellate Court in *Supreme Savings & Loan Ass'n* v. *Rado*. In the present case, R.S. 3466 (31 U.S.C., Sec. 191) also gives the United States priority over local taxes. *United States* v. *Gilbert Associates*, 345 U.S. 361.

be paid as an expense of the foreclosure sale in priority over the earlier federal tax lien. In agreement with the *Bond* and *Christensen* cases are *Metropolitan Life Ins. Co.* v. *United States*, 9 App. Dir. 2d 356 (N.Y.); *Buffalo Savings Bank* v. *Victory* (N.Y. Sup. Ct., App. Div. Fourth Dept.), decided July 1, 1960, and *Stadelman* v. *Hornell Woodworking Corp.*, 172 F. Supp. 156 (W.D.N.Y.); but see *Rikoon* v. *Two Boro Dress, Inc.*, 9 App. Dir. 2d 783, leave to appeal denied, 7 N.Y. 2d 711. The Court of Appeals of New York has not yet resolved the difference between the lower courts of that state.

In summary, there is no conflict as to the limited issue raised by the petition for a writ of certiorari. Such conflict among the lower courts in New York as may exist in the related issue presented in the New York cases has not yet been resolved by the Court of Appeals of that State.

CONCLUSION

Since there is no conflict among the final appellate courts or with the decisions of this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys.

AUGUST 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed. 3671.)

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) [As amended by Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has

by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * * *

(26 U.S.C. 1952 ed. 3672.)

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JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM 1960
No. 283

FIRST NATIONAL BANK OF CHIPPEWA FALLS, A CORPORATION
Plaintiff and Petitioner

vs.

CHARLES HENNEMAN COMPANY, A CORPORATION
Defendant

ANDY JOHNSON AND VIOLET JOHNSON
Defendants and Petitioners

UNITED STATES OF AMERICA
Defendant and Respondent

FRANK HAUPTMANN, AS RECEIVER OF CHARLES HENNEMAN COMPANY
Defendant

CHIPPEWA COUNTY
Defendant and Respondent

BRIEF OF CHIPPEWA COUNTY OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE
(Corrections and Additions)

On page 5 of the Petition it is stated "An itemization of taxes and interest due as of January 20, 1959, is shown at Appendix III, p. 22a." Evidently this is an error. The

taxes and interest to the end of July, 1960, are shown at pages 29a and 30a of Appendix IV to the petition.

On page 6 of the Petition there is a statement that the property was sold in the insolvency proceeding. It is not stated, but the fact is, that all of the parties stipulated for sale of the real estate and that the proceeds be substituted for the land (Record 99 thru 102) and the court entered an order directing sale (Record 103 and 104). The sale took place in 1955 (Petitioner's Appendix I, Opinion of Wisconsin Supreme Court, page 10a).

On page 7 of the Petition it is stated that the trial court "was of the opinion; that the county's taxes were unlawful and uncollectible." This goes too far. The trial court said that the county would receive no part of the proceeds of sale, but it did not say that the real estate taxes were unlawful nor imply that the real estate was immune to state taxation because the United States had a lien (Opinion of lower court, Petitioner's Appendix I, pages 1a to 3a).

ARGUMENT

I.

The petitioners are now asking the court to hold that mortgaged real estate becomes immune to state taxes when a federal lien is filed which exceeds the value of all of the taxpayer's property, both real and personal.

The first question is stated by the petitioners as follows (on page 2 of Petitioner's brief):

> "In those cases where a federal income tax lien exceeds the value of the taxpayer's property, and where the property is subject to mortgages which are prior to the federal lien, may state or local government, after the federal lien is filed, continue to levy and col-

lect a real estate tax on the full market value of the property?"

The federal lien attaches to all of the property of the taxpayer everywhere, because *26 U. S. C.* 3670 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." If mortgaged property is immune when an "encompassing" federal lien is filed, the local assessor can not decide whether any single parcel of real estate is immune to taxation until he determines (1) whether the property is mortgaged, (2) whether a federal lien has been filed, (3) how much is due on the federal lien, and (4) whether such amount due is greater or less than the total value of all of the taxpayer's property everywhere in the United States or the territories. If the assessor, after a complete audit of all of the property of the taxpayer, decides that its value is greater than the amount of the lien, the taxpayer must then repeat the whole process in order to know whether to pay the tax.

In the present case, we do not know what the debtor's property was worth in 1951 when the first disputed tax was assessed. Nor do we know what it was worth in 1952, 1953, or 1954. We only know what price the debtor's real estate brought when it was sold in 1955 pursuant to stipulation in this action and in the receivership (Record page 100). The petitioners are asking this Court to hold that the 1951, 1952, 1953, and 1954 taxes were "invalid" because in 1955 it turned out that the real estate sold for less than the amount of the government lien. It appears that the new rule of law to be announced by the Court must take into account many factors peculiar to the present case,

and the precedent thus established would have to be stated like an algebraic formula.

The petitioners contend that their first question was presented both to the trial court and the Supreme Court of Wisconsin. But the record does not contain any proof of values in 1951. Without such proof, how can the Court in 1960 say that the property was immune from real estate taxes in 1951, 1952, 1953 and 1954? Or do the petitioners ask the Court to hold that all of the real estate taxes of Wisconsin for those years were invalid because the tax statute was imperfectly drawn? Do they contend that a state tax law must contain provisions safeguarding the federal revenues in those situations where a federal lien is filed against mortgaged property?

Restated in the circumstances of the present case, the contention of the petitioners amounts to this: If the value of a debtor's real estate, as determined by voluntary sale in 1955, was less than the amount of a federal lien which attached to all of the debtor's property in 1951, real estate taxes assessed against the debtor's real estate in 1951, 1952, 1953, and 1954 were invalid because the real estate was actually property of the United States and as such immune from state taxes.

On page 16 of their brief, the petitioners "concede that even the most careful reading of the opinion of the Wisconsin Supreme Court would not indicate that any of the questions here raised had been presented to it." But they contend that the state courts in effect decided these questions, because the points were mentioned in the course of the litigation, and they quote from their briefs to demonstrate that similar questions were called to the attention of the state courts.

For example, in their trial brief Andy and Violet Johnson said (Petitioner's Appendix III at pages 23a and 24a):

> "This lawsuit demonstrates very clearly that, after deducting the mortgagees' share of the real estate, the balance of the real estate belongs to the United States. The United States does not have title to the real estate, because it has not foreclosed its lien; and, therefore, technically the local municipality might still have some legal basis for assessing real estate taxes; but, it does not have any equitable basis for requiring the mortgagees to pay taxes on the entire assessed valuation."

Even though the rule adopted in the state courts has an inequitable effect on these mortgagees, the United States court should not interfere, because, as the Court stated in *Orvis v. Powell* (1878), 98 U. S. 176, 25 L. ed. 238, at page 239 of 25 L. ed.:

> "As regards the question raised by the first of these assignments, we are relieved of all discussion of what is the true, equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the State where the land lies."

A reading of the entire record here will show that this is a desperate, last ditch attack upon the validity of a tax. The briefs will show that the petitioners wondered, speculated, queried, and doubted, but never cited cases to sustain their attack on the validity of the real estate taxes. In fact, both of the petitioners stipulated that the "invalid" 1955 tax should be prorated and paid from the sale proceeds (Record page 100), and the petitioners Johnson offered to pay all of the "invalid" taxes if they could be assured that such payment would displace the federal lien (Record page 224-11, Appendix 23a).

The petitioners' argument on the validity or invalidity of the real estate tax is set forth, without citation of cases, on page 19 of their petition, as follows:

> "Since the federally owned share is not taxable by the state, the state cannot continue to levy a tax on the whole of the market value of the property, and collect it from the mortgagees' interest.
>
> "The due process clause, and the equal protection clause both limit the state's power to tax, to a tax on the mortgagees' interest.
>
> "Under Wisconsin law, real estate is assessed to the owner, not split up into mortgagor and mortgagee interests. Since the United States had become the owner of the property, no tax could be levied or collected."

These assertions of the petitioners should be supported by decisions of this Court. The respondent has found two cases where similar attacks were made upon the validity of state tax laws purporting to assess the full value of all interests in real estate. Although in each case the United States had an interest in the real estate, it was nevertheless held that the state tax law was valid. These cases will be discussed in the next section of this brief.

II.

This court has held that the full value of all interests in real estate may be assessed by the states even though legal title is in the United States, so long as no attempt is made to enforce the tax against the interest of the United States.

The petitioners close their eyes to the fact that the United States had only a lien against this real estate, and did not

have legal title when the real estate taxes in question were levied. The taxpayer's property does not become property of the United States when the lien is filed. The federal tax liability may be paid or compromised. But in effect the petitioners contend that the filing of an "encompassing" lien amounts to a confiscation or expropriation of the taxpayer's property.

If the state may tax the full value of real estate to the equitable owners despite the fact that legal title is in the United States, surely the state may tax the full value to the legal owners despite the fact that the United States has a lien. In two cases this Court has held that states may tax the interests of purchasers under land contracts where the legal title is in an agency of the United States.

In *New Brunswick v. United States* (1928), 276 U. S. 547, 72 L. ed. 693, 48 S. Ct. 371, it appeared that legal title to the real estate was held by an agency of the United States, namely, the United States Housing Corporation, but the purchasers had made enough payments so that they were entitled to a deed upon executing notes and mortgages for the balance of the purchase price. Real estate taxes assessed after the sale were not paid and tax sale was threatened. This Court said, at page 698 of 72 L. ed.:

> "Under the provisions of the New Jersey law the taxes assessed to the purchasers, as equitable owners, rest upon the entire lots; including not only the interests of the purchasers as equitable owners, but the interest of the corporation retained and held as security for the payment of the unpaid purchase moneys; no distinction being made under that law between the interest of the owners and that of mortgagees or lienors. We see no reason, however, if the New Jersey law permits, why the city may not assess taxes against the purchasers upon the entire value of the lots and

> enforce collection thereof by sale of their interests in the property. With that the corporation and the United States have no concern. But it is plain, under the doctrine of the Clallam County case, that the city is without authority to enforce the collection of the taxes thus assessed against the purchasers by a sale of the interest in the lots which was retained and held by the corporation as security for the payment of the unpaid purchase money, whether as an incident to the retention of the legal title or as a reserved lien or as a contract right to mortgages. That interest, being held by the corporation for the benefit of the United States is paramount to the taxing power of the state and cannot be subjected by the city to sale for taxes."

The *New Brunswick* case was cited and followed in *S.R.A. Inc. v. The State of Minnesota* (1945), 327 U. S. 558, 90 L. ed. 851, 66 S. Ct. 749, in which this Court held (headnote 12):

> "A state may constitutionally tax the interest of a purchaser, under an executory contract, of land to which the United States retains legal title, so long as the rights of the United States remain unaffected."

The Minnesota tax law in question was like the Wisconsin law in that the real estate taxes were assessed on the parcel of land as a "unitary item" including all rights and privileges.

These decisions have settled the question the petitioners now attempt to raise as to the validity of a state tax upon real estate to which a federal tax lien has attached. If the land may be taxed where legal title is in the United States, certainly it may be taxed where legal title is in a private corporation and the United States has only a lien which has attached to all of the property of the private corporation. If the Wisconsin Supreme Court failed to discuss this

question, it may be assumed that it did so because the petitioners' arguments had failed to create doubt as to the validity of the tax. The entire real estate tax system of the State of Wisconsin should not be held invalid because the tax statute makes no mention of the effect the tax will have upon a prior federal tax lien.

Under the petitioners' view of the law, it would be to every taxpayer's advantage to have a federal tax lien attach to his real estate, making it immune to local real estate taxes. The taxpayer could afford a modest federal lien if he owned many parcels of real estate scattered over the country, because a modest lien would be large enough to "encompass" each parcel separately and render it immune to local taxes, even though such lien were very small in relation to all of the property of the taxpayer.

The immunity of federal property from state taxes is expressly recognized by Section 1.04, *Wisconsin Statutes*, which provides as follows:

> "1.04 *United States sites exempt from taxation.* Upon full compliance by the United States with the requirements of sections 1.02 and 1.03, relating to the acquisition of any place or tract within the state the governor shall execute in duplicate, under the great seal, a certificate of such consent given and of such compliance with said sections, one of which shall be delivered to such officer of the United States and the other filed with the secretary of state. Such certificate shall be sufficient evidence of such consent of the legislature and of such compliance with the conditions specified. All such places and tracts after such acquisition and while owned by the United States, shall be and remain exempt from all taxation and assessment by authority of the state."

In the present case the Wisconsin courts have expressly recognized that the rights of the United States may not be

affected by enforcement of the state tax. The proceeds of sale have been divided, and the entire share of the United States has been set aside for it. The state tax has been enforced only as against the interests of the petitioners. Neither of the petitioners has any standing as an agency or instrumentality of the United States, and therefore neither of the petitioners may claim immunity from enforcement of the state tax.

III.

In the trial court, the United States Attorney raised a federal question by contending that the federal lien displaced the mortgages under Section 3466 of the Revised Statutes (because the debtor was insolvent), but this question was not considered by the Supreme Court because in its Supreme Court brief the United States expressly abandoned this claim.

It may be helpful in considering the present case to know that the United States Attorney modified his contentions as the case progressed. In the trial court the United States claimed that the federal tax lien displaced the mortgages because the debtor was insolvent. Section 3466 of the Revised Statutes, *31 U. S. C. A.* 191, was relied upon in pressing this claim (Memorandum Brief of United States, Record pages 159 through 197, at page 172). Because the attention of the trial court was focused upon this extreme claim of the United States, the trial court failed to recognize that state law must be applied to the question of priority as between the mortgages and subsequent real estate taxes. However, the trial court discarded the claim of absolute priority for the federal tax lien (Decision of trial court, Record pages 114 through 115, at page 114).

The claim of absolute priority of the United States under

Section 3466 of the Revised Statutes, which was vigorously pressed in the trial court, dropped from the case in the Supreme Court. In his Supreme Court brief, the United States Attorney said (Record pages 448 to 476, at page 463):

> "The United States has abandoned its claim below that it is entitled to priority under Section 3466 of the Revised Statutes, supra, because of the taxpayer's act of insolvency, over the mortgagees."

IV.

The only federal questions remaining for the Wisconsin Supreme Court were (1) priority as between the federal lien and prior mortgages, and (2) priority as between the federal lien and subsequent real estate taxes.

After the United States abandoned its claim of absolute priority under the insolvency statute, there were only two federal questions to be answered by the Wisconsin Supreme Court. These were (1) priority as between the federal lien and prior mortgages and (2) priority as between the federal lien and the subsequent real estate taxes. Both questions were correctly answered by the trial court and the Wisconsin Supreme Court.

After these questions were answered, there remained one more question for the Wisconsin courts, namely, priority as between the mortgages and the real estate taxes. But that was not a federal question. Priority as between mortgages and real estate taxes is a matter of state law, in which federal courts should not interfere.

In studying federal lien and priority cases, counsel has not found one decision of the United States Supreme Court ruling on priority as between a mortgage lien and a state tax lien. The decisions are confined to questions of priority

as between federal liens and other liens. As the Court said in *United States v. New Britain* (1954), 347 U. S. 81, 98 L. ed. 520, 74 S. Ct. 367, at page 527 of 98 L. ed., the question of priority as between mortgages and state taxes is "a matter of state law."

V.

Both the trial court and the Supreme Court held that (1) under Section 3672 of the Code, the mortgages were superior to the subsequently filed federal lien, and (2) under federal case law, the federal lien was superior to real estate taxes assessed after the federal lien attached.

Section 3672 of the Code made it clear that the interests of the mortgagees were preserved as against the federal lien, and both the trial court and Wisconsin Supreme Court so decided. This question having been correctly answered, there remained only the question of priority as between the federal tax lien and the subsequent real estate taxes. In accordance with the ruling in *Michigan v. United States* (1942), 317 U. S. 338, 87 L. ed. 312, 63 S. Ct. 302, both courts held that the local taxes could not displace the federal lien. The petitioners do not complain of the state court answers to these federal questions. Instead, they attempt to set up additional questions which may now be answered in their favor.

VI.

The trial court's error in applying federal law to determine priority as between the mortgages and the real estate taxes was corrected by the Wisconsin Supreme Court, which held that priority as between the mortgages and the real estate taxes was a matter of state law.

As stated above, the trial court held that Section 3672 of the Internal Revenue Code (*26 U. S. C.* 3672) preserves the rights of prior mortgagees not only *as against the federal tax lien*, but also as against subsequent real estate taxes (Decision of trial court, Record pages 108 through 115, at page 114), saying:

> "Thereupon the question arises whether a priority for payment of real estate taxes arises as against the mortgage interests. If it does, the priority to the mortgages under the statute is largely absorbed * * * It is not apparent how in the circumstances present the rights of lien claimants which are completely overridden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage there is nothing after the mortgage to which such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that."

The foregoing quotation shows that the trial court failed to limit the effect of the federal priority statutes to the federal questions involved in the case. Instead, the trial court attempted to solve the state priority problem by applying the federal priority rule. This was error. As this Court said in *United States v. Marxen* (1938), 307 U. S. 200, 83 L. ed. 1222, 59 S. Ct. 811, at pages 1227 and 1228:

> "Priority has been secured to the United States in varying language throughout its history. The tendency has been to interpret these provisions liberally to secure the advantage sought by Congress. * * * But this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States only."

The trial court's error in applying federal law to the priority problem of the mortgagees versus the county was corrected by the Supreme Court of Wisconsin, which held that priority as between the mortgages and the county was a matter of state law (Record page 243, Petitioner's Appendix 13a).

VII.

Since the state court decided the federal question in accordance with the decision in United States v. New Britain, certiorari should be denied.

In its brief for the Wisconsin Supreme Court, the county quoted the entire opinion in *United States v. New Britain* (1954), 347 U. S. 81, 98 L. ed. 520, 74 S. Ct. 367, with particular emphasis upon the following language (at page 527 of 98 L. ed.):

> "The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien."

The Wisconsin Supreme Court carefully followed the *New Britain* decision. It held that priority as between the real estate taxes and the mortgagees was a matter of state

law. It applied the rule of "first in time, first in right" as between the federal lien and the real estate taxes, and applied Sec. 3672 of the Internal Revenue Code, *26 U. S. C. A.* 3672, as between the mortgages and the federal lien (Opinion of Wisconsin Supreme Court, Petitioner's Appendix I, pages 3a to 13a, at page 12a).

Since *United States v. New Britain* was carefully followed in deciding the federal questions presented by the record, it does not now appear that a federal question has been decided in a way "probably not in accord with applicable decisions of the Supreme Court of the United States." The petition for certiorari should therefore be denied.

VIII.

Because the petitioners did not pay the subsequent real estate taxes, this case does not properly present the question whether such payment could enlarge their mortgage interests at the expense of the federal lien.

In *United States v. New Britain* (1954), 347 U. S. 81, 98 L. ed. 520, 74 S. Ct. 367, there was a priority contest involving two mortgages, a judgment of record, a federal tax lien, and real estate taxes and water rent liens, some of which had attached before the federal lien and some after. The State of Connecticut contended that the mortgagee could have paid the delinquent real estate taxes and water rents, with the amount so paid becoming part of the mortgage debt secured by the mortgage lien, thereby pushing aside the federal tax lien pursuant to Section 3672. The Supreme Court of the United States declined to say whether the federal lien could be displaced by such payment, explaining in Footnote 12, "We need not now pass upon the merits of this suggestion since the situation is not presented by the record in this case."

The same is true in the present case. The record shows that the mortgagees did not avail themselves of their right under state law to pay the taxes and add them to their mortgages. In their brief the petitioners explain that it would be unrealistic and unreasonable to expect the mortgagees to risk the further sum of $15,000 in order to be entitled to raise this question. But their study of the Wisconsin cases on the effect of the real estate tax should have warned them that these taxes were a threat to their mortgage security. There is nothing new about the proposition that a mortgagee must either (1) compel the mortgagor to pay the real estate tax, (2) pay it himself, or (3) foreclose before the tax eats up his security.

In *Aberg v. Moe* (1929), 198 Wis. 349, 224 N. W. 132, the Wisconsin court said, at page 359:

> "No doubt the legislature might empower the assessor to assess the leasehold interest against the lessees and so divide up the property for the purposes of taxation. That, however, has never been the policy of our law so far as we know except for a brief period when the state undertook to tax the respective interests of the mortgagor and mortgagee separately. The entire property, including all interests in it, is assessed to the owner of the property as defined in the statute, and the right of every person claiming any interest in the property subordinate to the fee, whether under lease, contract, or otherwise, is extinguished if the property be sold in the exercise of the taxing power."

The fact is that the petitioners are complaining of a loss of security which resulted not from uncertainty as to the meaning of Section 3672, but from their own neglect to act promptly after they learned of the filing of a federal lien.

CONCLUSION

We therefore respectfully submit that the federal questions in this case have been correctly answered in accordance with settled rules of law, and that the petition for certiorari should be denied.

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In the
Supreme Court of the United States

OCTOBER TERM 1960
NO. 283

FIRST NATIONAL BANK OF CHIPPEWA FALLS, A CORPORATION
Plaintiff and Petitioner

vs.

CHARLES HENNEMAN COMPANY, A CORPORATION
Defendant

ANDY JOHNSON AND VIOLET JOHNSON
Defendants and Petitioners

UNITED STATES OF AMERICA
Defendant and Respondent

FRANK HAUPTMANN AS RECEIVER OF CHARLES HENNEMAN COMPANY
Defendant

CHIPPEWA COUNTY
Defendant and Respondent

REPLY BY JOINT PETITIONERS TO BRIEFS OF UNITED STATES AND CHIPPEWA COUNTY

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In the
Supreme Court of the United States

October Term 1960
No. 283

First National Bank of Chippewa Falls, a corporation
Plaintiff and Petitioner

vs.

Charles Henneman Company, a corporation
Defendant

Andy Johnson and Violet Johnson
Defendants and Petitioners

United States of America
Defendant and Respondent

Frank Hauptmann, as receiver of Charles Henneman Company
Defendant

Chippewa County
Defendant and Respondent

REPLY BY JOINT PETITIONERS TO BRIEFS OF UNITED STATES AND CHIPPEWA COUNTY

ARGUMENT

I.

Reply to arguments concerning the first federal question.

A. Our failure to cite authorities on this question was not due to lack of them.

Our first federal question challenges the ability of the County to levy and collect taxes upon the portion of the property taken by the federal lien after that lien attached. Our position is that no more than the mortgagees' interest can be lawfully taxed once the federal lien attaches. This finds considerable support in the statutes and decisions.

Both the United States and the County have implied in their briefs that our failure to cite cases on this point implies that there are none favoring our position. This is not so, as their reading of the briefs in the Wisconsin Supreme Court should have told them. We did not argue the merits at length because we understood that the petition for certiorari should be devoted to the importance of the question and the reasons why the writ should issue, not the merits of the case.

There is a long line of lower federal decisions which say that once a federal lien has attached the property has two owners; the record owner, and the government. Cases so saying are:

U. S. v. Greenville (1941), C. C. A.-4th, 118 F. 2d 963;

U. S. v. Cox (1953), D. C.-N. Dist. Ga., 119 F. Supp. 147;

Commissioner v. Coward (1940), C. C. A.-3rd, 110 F. 2d 725;

Welch v. U. S. (1955), C. C. A.-D. C., 220 F. 2d 200;

U. S. v. Metropolitan Life Ins. Co. (1958), 256 F. 2d 17;

U. S. v. Durham Lumber Co. (1958), 257 F. 2d 570;
Highsmith v. Lair (1955), 281 P. 2d 865.

In addition, *26 U. S. C.* 3704(c)(2), now *26 U. S. C.* 6339(b)(2), provides that if property subject to a federal lien is sold at distraint, the deed given shall have the effect of passing all of the title of the record owner as of the date the U. S. lien attached.

Clearly, the above decisions and the statute indicate that the lien is more than a security interest.

This is borne out by the following decisions holding that once the federal lien has attached, local government may not tax the federal interest.

U. S. v. City of New York (1956), C. C. A.-2d, 233 F. 2d 307;
U. S. v. Maddas (1953), D. C.-W. D. Pa., 109 F. Supp. 607;
Cobb v. U. S. (1949), C. C. A.-D. C., 172 F. 2d 277.

After the petition was filed, we learned of the decision of *Borock v. City of New York* (1959), 268 F. 2d 412. That case holds that the federal lien does not constitute more than a security interest and appears to conflict with the other cited cases.

The lucky fact that there are mortgages on the debtors' property should not change the taxability of the federal interest. Certainly, if any tax can be collected, it can only be a tax on the value of the mortgagees' interest.

B. Cases cited by the County do not apply.

The County cites two cases which it says have determined that the property must not be split up into separate interests for taxation purposes. These are *New Brunswick v. United States* (1928), 276 U. S. 547, 72 L. Ed. 693, 48

S. Ct. 371, and *S. R. A. Inc. v. Minnesota* (1955), 327 U. S. 558, 90 L. Ed. 851, 66 S. Ct. 749. Neither of these cases deals with property taken by a federal income tax lien. Each holds that an individual buying land from the government on land contract may be taxed on the whole value of the land without any deduction for the federal interest. This is a far different situation than ours, because in those cases, the individuals were in the process of obtaining title to all of the property. That is not true in our case. No matter what the mortgagees do they can never recover more than the amount of their mortgages.

C. The New Britain case is of limited application.

United States v. New Britain (1954), 347 U. S. 81, 98 L. Ed. 520, 74 S. Ct. 367 does not deal with the validity of local taxes, but rather with the relative priority of a local tax as against the federal lien. Insofar as the legality of the local tax is concerned, it is of no help at all in this case.

In the *New Britain* case, no issue was presented between the mortgagee and the local tax in this Court. The mortgagee was not even a party to the appeal. Justice Minton, in the opinion, did volunteer the dictum that relative priority between mortgagees and local tax liens was a matter of state law, and of no concern to the United States. This statement is important because it disposes of so many questions raised here without hearing any argument on them.

It is our position that Congress did not intend a superpriority for real estate taxes in enacting *26 U. S. C.* 3672 (now *26 U. S. C.* 6323). We think it clear that Congress did not intend that local taxes could be fully paid in a case like this one, where the federal lien goes substantially unpaid.

D. The federal lien did exceed the value of the Henneman Company's interests.

The County argues that a sale in 1955 is not evidence of the value of the company's property in 1951. We disagree. After the federal lien attached in 1951, any sale of the property would have been a forced sale. The Company could not expect to receive a top price in that situation.

Even using the assessed valuation for 1951 (Appendix I) the lien far exceeded the value of the Company's property. Total assessed valuation was $99,150.00. The mortgages amounted to about $26,000.00 leaving a net value of the Company's interest of $73,150.00, while the federal lien was in excess of $96,000.00.

We ask the Court to take judicial notice of the assessment figures. It is perfectly proper to do this. The County was allowed to supply, in the Wisconsin Supreme Court, a complete statement of taxes, even though these had never been pleaded or proved (Record pages 69-72, 94, 97, 157, 158).

E. Summary.

There is a long line of cases supporting the result we ask the Court to reach here. The cases cited by the County do not apply because they do not deal with mortgagees who cannot acquire all title to the property, and lastly the federal lien did exceed the value of the Henneman Company's property when it was filed. This question is new and has never been decided by this Court.

II.

The second federal question dealing with the mortgagees' right to pay local taxes, if valid, is open in this court.

We included the second question in our petition because it was specifically left open by this Court when it decided *U. S. v. New Britain*.

Respectfully submitted,

WILEY AND DEVINE
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APPENDIX I.

	Assessed Valuation
Lot 4, Block 9, Allen's Addition	$ 4,370.00
Lots 5 and 6, Allen's Addition	87,940.00
Lot 8, Block 5, Allen's Addition	1,860.00
The North One-half of Lot 1, Block 5, Mansfield's Addition	4,980.00
Total Assessed Valuation of above real estate:	$99,150.00

I, Elsie Brinkman, County Treasurer in and for Chippewa County, Wisconsin, hereby certify that the annexed and foregoing is a true and correct transcript of the assessments of the above described real estate for the year 1951, on file and of record in my office for the year 1951.

In testimony whereof, I have set my hand this 7th day of September, 1960.

ELSIE BRINKMAN,
County Treasurer,
Chippewa County, Wis.